STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc. and Allegiance Telecom of Illinois Inc.	)	
vs.	)	
Illinois Bell Telephone Company, d/b/a SBC Illinois	)	Docket No. 05-0156 (consolidated with 05-0154 and 05-0174)
In the Matter of a Complaint Pursuant to 220 ILCS 5/13-515,	)	

INITIAL BRIEF OF XO ILLINOIS, INC. AND ALLEGIANCE TELECOM OF ILLINOIS INC.

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I. INTRODUCTION

This proceeding was initiated by XO Illinois, Inc. and Allegiance Telecom of Illinois, Inc.[1] ("XO and Allegiance") because SBC Illinois ("SBC") insisted on unilaterally implementing the Federal Communications Commission's ("FCC's") *Triennial Review Remand Order* ("*TRRO*")[2] by issuing "Accessible Letters" that changed the terms of the interconnection agreements between the parties. SBC took this action, despite the FCC's clear directive that its order was to be implemented through amendments to existing interconnection agreements. In its *Order Granting Emergency Relief*, issued on March 9, 2005, the Commission reached the preliminary conclusion that "the *TRRO* does not permit such self-help." The Commission also noted that SBC's Accessible Letters "do not address, or may wrongly decide, how some of the details of *TRRO* implementation will be accomplished." In summary, the Commission found

[1] Both wholly owned subsidiaries of XO Communications, Inc.

[2] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("*Triennial Review Order*") ("*TRO*").

that "the FCC intended for those details to be addressed through bilateral negotiations and, if needed, dispute resolution."

As discussed below, the Commission's preliminary conclusion was correct. Very simply, SBC must implement the *TRRO* by negotiating changes to interconnection agreements with CLECs. In fact, the Judge Gottschall of the United States District Court, Northern District of Illinois, has already made that finding in a ruling on a preliminary injunction in an action brought by SBC. *Illinois Bell Telephone Company v. Hurley et al*. Cause No. 5 – C - 1149 Memorandum and Opinion Order, March 29, 2005.

This Complaint was brought pursuant to Sections 13-515 of the Illinois Public Utilities Act ("PUA" or "Act") and 83 Ill. Admin. Code Part 766. The Complaint alleged that SBC's use of Accessible Letters to implement the *TRRO* violated 220 ILCS 5/13-514 and Section 252 of the Federal Telecommunications Act of 1996 ("Federal Act").

The event leading to the complaint was SBC's threat that it would refuse to take new orders for certain unbundled network elements ("UNEs") effective March 11, 2005 and its threat to begin charging higher rates on that date for certain UNEs. SBC had indicated that regardless of the status of negotiations over amendments to the parties' interconnection agreements to implement the *TRRO,* it would still withdraw certain UNEs effective March 11, 2005.

XO and Allegiance requested in the Complaint initiating this proceeding that the Commission direct SBC to continue to provide all UNEs currently required to be provided in the parties' interconnection agreements and that it do so under current prices until amendments to the parties' interconnection agreements have been negotiated and become effective. XO and Allegiance also sought a finding that SBC Illinois is violating the federal Act and that it is knowingly engaging in prohibited conduct set forth in Section 13-514 of the PUA that has an

adverse impact on competition and that the Commission award damages allowed under Section 13-516 of the PUA.

II. HISTORY OF DISPUTE

On March 2, 2004, the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Ass'n v. FCC* ("*USTA II*")[3] affirmed in part, and vacated and remanded in part, the FCC's *Triennial Review Order* ("*TRO*"), which obligated ILECs to provide requesting telecommunications carriers with access to certain UNEs.[4] The D.C. Circuit initially stayed its *USTA II* mandate for 60 days. The stay of the *USTA II* mandate later was extended by the D.C. Circuit for a period of 45 days, until June 15, 2004 on which date the D.C. Circuit's *USTA II* mandate issued. At that time, certain of the FCC's rules applicable to SBC's obligation to provide CLECs with UNEs were vacated.

On August 20, 2004, the FCC released its *Interim Rules Order*, which held *inter alia* that ILECs shall continue to provide unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[5] The FCC required that those rates, terms and conditions remain in place until the earlier of the effective date of final unbundling rules, or six months after publication of the *Interim Rules Order* in the Federal Register.[6]

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[3] 359 F.3d 554 (D.C. Cir. 2004).

[4] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("*Triennial Review Order*") ("*TRO*").

[5] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Aug. 20, 2004) ("*Interim Rules Order*").

[6] *Id.* ¶ 21.

On February 4, 2005, the FCC released the *TRRO*, including its latest Final Unbundling Rules.[7] In the *TRRO*, the FCC found *inter alia* that requesting carriers are not impaired without access to local switching and dark fiber loops. The FCC also established conditions under which ILECs would be relieved of their obligation to provide pursuant to section 251(c)(3) unbundled access to DS1 and DS3 loops, as well as certain DS1, DS3 and dark fiber dedicated transport.

In the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC held that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[8] As provided in the *TRRO*, the FCC order became effective on March 11, 2005.[9]

On February 11, 2005, SBC issued an Accessible Letter in which SBC alerted carriers to the issuance of the *TRRO* and made certain unfounded pronouncements regarding the effects of that order. Specifically, SBC claimed:

> As set forth in the TRO Remand Order, specifically in Rule 51.319(a)(6), as of March 11, 2005, CLECs "may not obtain," and SBC and other ILECs are not required to provide access to Dark Fiber Loops on an unbundled basis to requesting telecommunications carriers. The TRO Remand Order also finds, specifically in Rules 51.319(a)(4), (a)(5) and 51.319(e), that, as of March 11, 2005, CLECs "may not obtain," and SBC and other ILECs are not required to provide access to DS1/DS3 Loops or Transport or Dark Fiber Transport on an unbundled basis to requesting telecommunications carriers under certain circumstances. Therefore, as of March 11, 2005, in accordance with the TRO Remand Order, CLECs may not place, and SBC will no longer provision New, Migration or Move Local Service Requests (LSRs) for affected elements. "[10]

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[7] In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005)("Triennial Review Remand Order") ("*TRRO*"). SBC already has sought to overturn this order. United States Telecom Ass'n et. al. v. FCC, Supplemental Petition for Writ of Mandamus, Nos. 00-1012 et. al. (D.C. Cir.), filed Feb. 14, 2005 (SBC, Qwest, SBC and Verizon were parties to the pleading).

[8] *Id.* ¶ 233.

[9] *Id.* ¶ 235.

[10] CLECALL05-019

SBC further claimed: "The effect of the *TRO* Remand Order on New, Migration or Move LSRs for these affected elements is operative notwithstanding interconnection agreements or applicable tariffs."[11]

Similarly, in a second Accessible Letter, SBC stated that as of March 11, 2005 it would reject UNE-P orders and orders for high capacity loops and transport where SBC believed the *TRRO* has relieved SBC of its obligation to provide such UNEs:

> As explained in CLECALL05-019, as of the effective date of the TRO Remand Order, i.e., March 11, 2005, you are no longer authorized to send, and SBC will no longer accept, New, Migration or Move LSRs for unbundled high-capacity loops or transport, as is more specifically set forth in that Accessible Letter, and such orders will be rejected.
>
> Your embedded base of the affected high-capacity loop and transport elements will be treated as is more specifically set forth in the attachments to this Letter, as per the requirements of the TRO Remand Order.[12]

SBC also announced that CLECs should immediately download and execute the Amendment to their interconnection agreement that SBC claims reflects changes required by the *TRRO*:

> Also attached is a sample amendment to your Interconnection Agreement. A signature-ready Amendment and instructions will be available on CLEC-Online (https://clec.sbc.com/clec) not later than February 21, 2005, for you to download, print, complete and return to SBC. Please sign and return the Amendment to SBC by March 10, 2005.[13]

Rather than engage in the self-help used by SBC, XO and Allegiance followed the terms of the parties' interconnection agreements. On Feb 18, 2005, XO and Allegiance made formal requests to establish amendments between SBC Illinois and XO to incorporate changes necessary to reflect the *TRRO.*[14] Both stated in their letter:

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[11] *Id.* at 2.
[12] CLECALL05-020
[13] *Id.*
[14] See Exhibit 4.0, Exhibit B (attached as Exhibit B to XO's and Allegiance's Emergency Motion.

> [t]he rules adopted in the triennial Review remand Order constitute a change in law under the current interconnection agreement ("ICA") between XO and Illinois Bell telephone Company d/b/a SBC Illinois ("SBC"). Pursuant to Section 2.1 of the second Amendment Superceding Certain Intervening law, Compensation, Interconnection and Trunking Provisions of that ICA, formal written notice is required to begin the process of entering into negotiations to arrive at an amendment to implement into the ICA the FCC's determinations in the Triennial Review Remand Order.
>
> Accordingly, we herby provide this notice, and request that SBC begin good faith negotiations under Section 252 of the 1996 Telecom Act directed toward reaching a mutually agreeable ICA amendment that fully and properly implements the changes that have occurred as a result of the Triennial Review Remand Order.
>
> …..
>
> Please initiate the internal processes within SBC that will facilitate this request, and respond to this letter as expeditiously as possible with written acknowledgment of your receipt so that we may begin the negotiations process.

Also on February 18, XO and Allegiance sent a letter to SBC expressing disagreement with SBC's reading of the *TRRO*, as set forth in SBC's February 11, 2005 Accessible Letters.[15]

SBC responded to the requests to negotiate with a letter dated February 24, 2005.[16] In that letter, SBC refused to negotiate with XO and Allegiance in this matter and instead stated that it had posted accessible letters on its web site reflecting SBC's view of its unbundling obligations and XO should execute them and send them to SBC.

SBC furthers asserted in its February 24, 2005 letter that the matters of the accessible letters are a "part of a 13 state dispute process and therefore it would not be appropriate, nor is it necessary to initiate negotiations at this time." SBC also indicated that it "will begin billing the FCC's transition pricing modifications effective March 11, 2005" and "notwithstanding your ICA(s), orders received for elements that have been declassified through a finding of nonimpairment by the *TRO Remand Order* will not be accepted, beginning March 11, 2005."

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[15] See Exhibit 4.0, Exhibit C (attached as Exhibit C to XO's and Allegiance's Emergency Motion).
[16] See Exhibit 4.0, Exhibit D (attached as Exhibit D to XO's and Allegiance's Emergency Motion).

On March 2, 2005, XO and Allegiance sent to SBC letters under Section 13-515 providing it 48 hours to correct improper actions alleged in those letters.[17] Both letters requested that:

> SBC agree within 48 hours that it will take the following actions: (1) cease its demand that XO agree to the accessible letters, (2) enter into good faith negotiations to amend the parties' interconnection agreement and (3) agree to continue to provide unbundled network elements and agree to take orders for new unbundled network elements under the parties' existing interconnection agreement under existing prices until an amendment becomes effective.

On March 4, 2005 and on March 7, 2005, SBC sent XO and Allegiance responses to their 48 hour letters.[18] In its responses, SBC agrees to negotiate changes in the parties' interconnection agreements to reflect changes necessitated by the *TRRO*, but that SBC will still implement its plan to stop taking certain UNE orders effective March 11, 2005.

XO and Allegiance then filed the complaint that led to this proceeding. Along with the complaint, they filed a motion for emergency relief, which was granted by this Commission. Subsequent to the Commission's entry of an emergency order, XO and Allegiance sponsored the testimony of Gladys Leeger, Director of Regulatory Contracts for XO Communications, Inc. Ms. Leeger, who handles all contract negotiations and interconnection agreement negotiations with incumbent local exchange carriers such as SBC, attached a portion of the ICAs to her testimony demonstrating how SBC 's self help violated the parties' interconnection agreements. Exhibits 2.1, 2.2 and 2.3 to Ms. Leeger's testimony[19] are the relevant portions of the parties' interconnection agreements, including intervening law and dispute resolution. Exhibit 2.1, for Allegiance, contains sections on Dispute Resolution, Intervening Law, and Amendments and

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[17] See Exhibit 4.0, Exhibit E (attached as Exhibit E to XO's and Allegiance's Emergency Motion).
[18] See Exhibit 4.0, Exhibit F (attached as Exhibit F to XO's and Allegiance's Emergency Motion.
[19] Exhibits 2.1 through 2.3 were attached to Ms. Leeger's Direct Testimony (Exhibit 2.0) as Exhibits A through C, respectively.

Modifications. Exhibit 2.2, for XO, contains sections on Dispute Resolution and Regulatory Changes. Exhibit 2.3, for XO, contains amended language to the Intervening Law provision. Additionally, Exhibit 2.4 to Ms. Leeger's Direct Testimony[20], Section 17.5 of the Allegiance agreement, specifically states "Notices provided via Accessible Letters does not authorize SBC-13STATE to implement changes that require Commission approval." Read together, those provisions demonstrate that SBC cannot unilaterally amend interconnection agreements. Rather, pursuant to intervening law and dispute resolution procedures, the parties must enter into good-faith negotiations.[21]

III. ARGUMENT

A. The *TRRO* Is Not Self-Effectuating

SBC assumes that the effective date of the *TRRO* becomes the triggering event allowing the immediate modification of the parties' interconnection agreement. It is not. The *TRRO* is not, as claimed by SBC, "self effectuating" simply because the FCC stated that its order "shall take effect on March 11, 2005." SBC Objection at 1. SBC's verbal gymnastics ignore the simple fact that **every** order issued by the FCC, this Commission, state and federal courts and other regulatory bodies has a date on which it becomes effective. The effective date of the order, however, is not the same as the date that all activities associated with the order must be implemented. The FCC understood that when it directed that parties should implement the *TRRO* by amending their interconnection agreements, stating:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must

[20] Exhibit 2.4 was attached to Ms. Leeger's Direct Testimony (Exhibit 2.0) as Exhibit D.

[21] On March 29, 2005 XO and Allegiance filed Exhibit 2.5, Exhibits E through L, which contain further portions of XO's and Allegiance's interconnection agreements.

> implement changes to their interconnection agreements consistent with our conclusions in this Order.
>
> *TRRO* ¶233.

Given the fact that such amendments must be negotiated and perhaps arbitrated and then filed with the state commission for approval pursuant to section 252 of the federal Act, the FCC was obviously not directing ILECs to do what SBC has done here – unilaterally withdraw unbundled network elements without amending its interconnection agreements.

The FCC directed *both* incumbents and competing carriers to "negotiate in good faith" over "any rates, terms, and conditions necessary to implement our rule changes." *TRRO* ¶233. More specifically, the FCC stated: "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[22] Section 252 of the Act requires negotiations and state Commission arbitration of issues that cannot be resolved through negotiation. This process is not self effectuating. Thus, when the FCC stated that it expects carriers "to modify their interconnection agreements *including completing any change of law processes*" to implement the *TRO Remand Order*. *Id.* ¶227, it was not making a simple suggestion – it was requiring a specific, statutorily mandated process.

This decision by the FCC to employ the traditional process by which changes of law are implemented is reflected in several instances throughout the *TRRO.* With regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[23] The FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[24]

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[22] *Id.* ¶ 233.
[23] *Id.* ¶ 196.
[24] *Id.* at note 519.

Concerning high capacity transport, the FCC also stated that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[25] The FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[26]

With regard to UNE-P arrangements, the FCC also held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[27]

Thus, the FCC in no way indicated that it was unilaterally modifying state Commission approved interconnection agreements or that the changes-of-law that would become effective on March 11, 2005 would automatically supplant provisions of existing interconnection agreements as of that date. Notably, the FCC's position in the *TRRO* also mirrors the position it took in the *TRO.* In the *TRO,* the FCC declined Bell Operating Company requests to override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions, explaining that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252."[28]

The United States District Court, Northern District of Illinois has already rejected SBC's position that the *TRRO* is self-effectuating and can be implemented with its Accessible Letters. In an order entered on March 29, 2005, Judge Gottschall entered a ruling on a request by SBC for a preliminary injunction to allow it to put the *TRRO* into effect on March 11, 2005. Judge Gottschall completely rejected SBC's claim that the TRRO is self effectuating, stating:

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[25] *Id.* ¶ 143.
[26] *Id.* at note 399.
[27] *Id.* ¶ 227.

> Although the court agrees that the TRO Remand Order does not require ILECs to engage in protracted negotiations simply to stop doing what the FCC has said they are no longer required to do, the court is troubled by SBC's view that it can alter the parties' arrangements unilaterally and without meaningful notice. Unlike Paragraph 227, Paragraph 233 of the TRO Remand Order does not address only existing customers. Rather, it falls under the general heading of "implementation of Unbundling Decisions" and mandates that the parties "negotiate in good faith regarding *any* rates, terms and conditions necessary to implement" the rule changes. This requirement presumably would include the substantially increased rate SBC now wishes to charge the CLECs seeking access to SBC's switches. SBC has denied that its actions constitute bad faith because:)1 many of the Competing Carriers participated in the "rulemaking" that resulted in the TRO Remand Order; 2) it issued the "Accessible Letters" a month before it intended to stop provision of UNE-P; 3) it filed a petition with the ICC and "served notice on a host of [common] carriers"; and 4) it served notice on interested competitors that it was bringing the present action and did not oppose their motions to intervene. SBC Competing Carrier Reply Mem. At 9. To the extent that Paragraph 233 of the TRO Remand Order requires good faith negotiations, the court does not see how any these activities qualify.

Illinois Bell Telephone Company v. Hurley et al. Cause No. 5 – C - 1149 Memorandum and Opinion Order, March 29, 2005 at 11. After favorably quoting and relying upon this Commission's order granting emergency relief in these consolidated proceedings, Judge Gottschall concluded:

> Perhaps, as SBC suggests, it would be futile for the parties to sit down and negotiate as long as the preemption question has not been definitively resolved, but in this court's view that speculation does not excuse SBC from complying with the negotiation process. Paragraph 233 of the TRO Remand Order mandates that "the parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order," strongly implying that the FCC envisioned negotiations as a predicate to implementation of the TRO Remand Order's requirements.
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> Id at 12.

Judge Gottschall's ruling that SBC must implement changes necessitated by the *TRRO* through negotiations is consistent with recent Seventh Circuit decisions on the primacy of the negotiation process. At the insistence of SBC affiliates, the Seventh Circuit has determined that

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[28] *TRO* ¶701.

the negotiation process set forth in the Act is the only mechanism for changing parties' contractual relationship. *See Wisconsin Bell v. Bie*, 340 F.3d 441 (7th Cir. 2003); *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493 (7th Cir. 2004). The FCC could not have intended to abrogate that process and allow ILECs to unilaterally withdraw elements without engaging in the negotiation process required by the federal Act and the courts.

SBC cannot escape the FCC's clear and unambiguous language requiring parties to amend their interconnection agreement pursuant to change of law processes. Accordingly, Joint Petitioners seek a declaration that the *TRRO*'s unbundling decisions and transition plans do not "self effectuate" a change to the Parties' existing interconnection agreements and that they will not govern the Parties relationships until such time as – and only to the extent – that the interconnection agreements are modified to incorporate such unbundling decisions and transition plans.

SBC's unilateral accessible letters complied with neither the *TRRO* nor its interconnection agreement obligations.[29] Moreover, SBC's February 24, 2005 response was essentially a refusal to participate in good-faith negotiations. Telling CLECs that they must execute SBC's proposed amendments is not negotiation. The amendment proposed by SBC was one-sided because it only addressed SBC's view of the *TRRO*. SBC's proposed amendment was also too limited in scope because it failed to recognize SBC's obligations under Section 13-801 of the Public Utilities Act and under Section 271 of the federal Act (47 U.S.C. §271), both of which provide independent obligations to provide high capacity loops and transport.

[29] For example, see Exhibit 2.4, Section 17.5 of the Allegiance Agreement, stating that "Notices provided via Accessible Letters does not authorize SBC-13STATE to implement changes that require Commission approval."

SBC's initial threat to cut-off orders for DS1 and DS3 loops and transport that SBC claimed were no longer required to be offered as UNEs was directly contrary to paragraph 234 of the *TRRO*, which established a process for CLECs to make good faith requests for high capacity loops and transport and to have those loops and transport provided pending the resolution of any dispute with the ILEC over their need to be unbundled.[30] In its order granting the emergency relief requested by XO and Allegiance, the Commission agreed that SBC's action was improper self-help.

Seeing the handwriting on the wall, after the filing of this proceeding, SBC issued another Accessible Letter, CLECALL05-039, which sets out a procedure closer to the one contemplated by the FCC in paragraph 234 of the *TRRO*. While SBC's action in issuing 05-039 was a step in the right direction, it still violates the basic principle set out in the parties' interconnection agreements and in the *TRRO* that any changes to the parties' interconnection agreements must be negotiated in good faith and then approved by this Commission. Thus, while SBC's current self-help is more in line with the substantive requirements of the *TRRO*, it is still self-help that is not consistent with paragraph 233 of the *TRRO*, which requires parties to

[30] In part, paragraph 234 states:

> We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.
>
> (footnotes omitted).

implement the changes in UNE responsibilities through renegotiation of their interconnection agreements.

B. The Parties' Interconnection Agreements Require Their Amendment in Order to Effectuate the *TRRO*.

SBC's unilateral issuance of accessible letters as a mechanism to change the parties' obligations to each other is not consistent with the parties' interconnection agreements. The agreements of XO and Allegiance contain similar change of law language:

> In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in the Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent jurisdiction . . . the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party. **In such event, the Parties shall expend diligent efforts to arrive at an agreement regarding the appropriate conforming modifications to the Agreement. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this Agreement.**
>
> XO/SBC Interconnection Agreement, para. 29.6a
> Allegiance/SBC Interconnection Agreement, para. 21.1
> (emphasis added)

SBC has focused on the phrase that provides: "the affected provision shall be immediately invalidated, modified, or stayed" as support for its ability to implement the *TRRO* through Accessible Letters. SBC's argument ignores the language immediately following this phrase, which requires (1) written notice of intent to invalidate, modify or stay provisions in the interconnection agreement, (2) a renegotiation of the interconnection agreement and (3) the use of dispute resolution processes if those negotiations fail. XO and Allegiance are not aware of any notices sent by SBC informing them, as required by their interconnection agreements, that any provisions are now void, modified or stayed. Nor has SBC requested negotiation to

implement the *TRRO.* On the contrary, SBC refused the negotiations requested by XO and Allegiance in letters issued February 24, 2005.[31] While SBC initially resisted negotiations, SBC changed its position and started the process to negotiate amendments to the parties' interconnection agreements after the filing of this Complaint.[32]

The filing of the complaint and the Commission's issuance of temporary relief have forced SBC to follow paragraph 233 of the *TRRO* to implement changes to the parties' ICA via negotiation and to follow paragraph 234 of the *TRRO* to implement the high capacity loop and transport determinations of the FCC. Nevertheless, SBC is still not following the parties' interconnection agreements. First, SBC cannot insist upon compliance with the process set out in its Accessible Letter CLECALL5-039 until after the Commission approves the modification to the interconnection agreement now being negotiated. Second, SBC continues to have obligations under Section 13-801 of the Illinois Pubic Utilities Act and Section 271 of the Federal Communications Act. The nature of those obligations and the extent to which they replace SBC's Section 252 obligations that were changed in the *TRRO*, will be the subject of the negotiations for amendments to the interconnection agreements. Third, absent Commission action, there is nothing stopping SBC from issuing yet another Accessible Letter imposing more draconian measures on XO and Allegiance the moment this case is closed. Thus, SBC needs to be sent a firm message that it cannot continue to unilaterally modify the parties' obligations through the issuance of Accessible Letters. Instead, it must negotiate with CLECs to make appropriate changes to its interconnection agreements.

Although the temporary relief granted by the Commission has moved SBC in the right direction, there is still the need for permanent relief. XO and Allegiance assert that SBC's

[31] See Exhibit 4.0, Exhibit D (attached to XO's and Allegiance's Emergency Motion as Exh ibit D).

actions violate state law, including 200 ILCS 5/13-514, and federal law. XO and Allegiance seek injunctive relief from the Commission because SBC continues to attempt to unilaterally amend the parties' interconnection agreement through the issuance of its latest Accessible Letter. Again, the proper process set out in the parties' interconnection agreement and in paragraph 233 of the *TRRO* is for CLECs and SBC to negotiate changes to the parties ICA. Those negotiations are underway. This Commission should not tilt the balance of those negotiations toward SBC by allowing it to force its view on CLECs through Accessible Letters, leaving nothing to negotiate. Regardless of whether the Commission believes SBC's Accessible Letter LECALL05-039 is consistent with paragraph 234 of the *TRRO*, the fact remains that by imposing its procedures on CLECs outside of ICA negotiations through an Accessible Letter, SBC is still engaging in the sort of self help prohibited in the emergency order. The final order in this proceeding should therefore direct SBC to take no action to modify the rights of XO and Allegiance to use unbundled network elements until after this Commission has approved modifications to the parties interconnection agreements addressing these issues.

C. The Commission's Order in Docket 04-0371 Requires SBC to Continue to Provision UNEs Under the Terms of the Parties Existing Agreements, Until those Agreements Are Replaced with New Agreements.

Requiring SBC to implement the *TRRO* by negotiating changes to the parties' interconnection agreements would be consistent with this Commission's order in Docket 04-0371. In that proceeding, XO SBC arbitrated an amendment to their interconnection agreement pursuant to Section 252 of the federal Act. One of the issues in that proceeding was SBC's attempt to incorporate into the parties interconnection agreement language that would allow SBC to do exactly what it did in its February 11, 2005 Accessible Letters – unilaterally decide the

[32] See Exhibit 4.0, Exhibit F (attached to XO's and Allegiance's Emergency Motion as Exhibit F) Page 5 of Exhibit F is the March 7, 2005 supplemental letter from SBC to XO and Allegiance.

impact of an FCC decision on its unbundling obligations instead of following the change of law provisions in the interconnection agreement and negotiating necessary changes.

The Commission rejected SBC's proposal, stating:

> The Commission concurs with XO and Staff that SBC's proposals would essentially replace the change-of-law provisions in the parties' existing ICA with unilateral powers for SBC. XO Init. Br. at 29; Staff Init. Br. at 62. Those provisions contemplate bilateral negotiations between the signatories. In contrast, SBC's amendatory contract language (e.g., SBC proposed Section 1.1) would empower SBC to decline to provide UNEs, based upon, first, its unilateral assessment of the ramifications of regulatory and judicial authorities, and, second, its unilateral judgment of the efficacy of those authorities themselves, based on criteria we rejected above. Such provisions do not belong in the parties' ICA, whether to incorporate changes already compelled by the *TRO* or any future changes associated with the TRO and USTA II.

04-0371 Order at 50.

Subsequent to the entry of the order in Docket 04-0371, SBC and XO negotiated interconnection agreement language consistent with the Commission's directions that incorporates changes necessitated by the entry of the *TRO*. This "conforming amendment" explicitly endorsed the applicability of the change of law provision in the parties' underlying interconnection agreement:

> Except as prohibited or otherwise affected by the *"Status Quo" Order*, nothing in this Amendment shall affect the general application and effectiveness of the Agreement's "change of law," "intervening law", "successor rates" and/or any similarly purposed provisions. The rights and obligations set forth in this Amendment apply in addition to any other rights and obligations that may be created by such intervening law, change in law or other substantively similar provision.

The Allegiance/SBC interconnection agreement change of law provision provides as follows:

> In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in the Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent

> jurisdiction, including but not limited to any decision by the Eighth Circuit relating to any of the costing/pricing rules adopted by the FCC in its First Report and Order, *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996)(e.g., Section 51.501, et seq.), upon review and remand from the United States Supreme Court, in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999) or *Ameritech v. FCC*, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (June 1, 1999), the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party. In such event, the Parties shall expend diligent efforts to arrive at an agreement regarding the appropriate conforming modifications to the Agreement. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this Agreement.
>
> SBC/Allegiance Interconnection Agreement, Section 21 Intervening Law.

The SBC/XO Interconnection Agreement contains identical language in Section ICA 29.6a Intervening Law.

Thus, under both interconnection agreements, SBC can only implement the changes brought about by the *TRRO* through properly negotiated amendments to the parties' interconnection agreements. The Commission explicitly rejected the type of "self help" that SBC exercised when it issued its Accessible Letters on February 11, 2005 and that SBC is continuing to exercise through its latest Accessible Letter.

D. SBC's Obligation to Provide UNEs Includes its Obligations Under Section 271 of the Federal Act and Section 801 of the Illinois Public Utilities Act.

SBC has acted as if its obligation to provide unbundled elements is limited to its Section 252 obligations, as interpreted by the FCC in its regulations and various orders, such as the *TRRO.* SBC ignores the fact that, regardless of any changes in SBC's obligations to provide UNEs caused by the issuance of the *TRRO*, the company continues to be bound by its obligations under Section 271 of the federal Act and Section 13-801 of the Illinois Public Utilities Act.

This Commission has already found that SBC's obligations extend beyond those under

Section 252 of the federal Act. In the XO arbitration proceeding, SBC objected to any language in its XO/SBC interconnection agreement that recognized that Section 801 of the Public Utilities Act or Section 271 of the federal Act impose on SBC obligations beyond those contained in Section 252. Addressing SBC's argument, the Commission stated:

> This state has also established unbundling requirements, characterized in Section 13-801 of the Act[33] as "additional" to federal unbundling requirements. **When the pertinent ILEC is subject to an alternative regulation plan under Section 13-506.1 of the Act, as SBC is, such additional obligations may exceed or be more stringent than Section 251 obligations.** *Id*. We have held that we lack authority to declare that Section 13-801 is preempted by federally authority, insofar as that statute authorizes unbundling in excess of federal requirements. Docket 01-0614, Order, June 11, 2002, ¶ 42. Id.
>
> Order, Docket 04-0371 at 48 (emphasis added)

XO and Allegiance note that this Commission is currently reevaluating its order implementing Section 13-801 and that an order in that proceeding, Docket 01-0614, is expected shortly. Meanwhile, SBC has filed an action in federal district court arguing that Section 13-801 is preempted by the federal Act. While there may be some changes in SBC's obligations under Section 13-801, at this time, SBC is bound by the PUA and this Commission's interpretation of the Section 13-801. SBC may not, as it has done in its Accessible letters, assume it has no such obligations.

This Commission's order in the XO arbitration also rejected SBC's claim that the parties interconnection agreement cannot require it to abide by its unbundling obligations imposed by Section 271 of the federal Act, stating:

> The parties' disagreement respecting 271 UNEs is reflected in so many provisions throughout their respective proposed TRO Attachments that we cannot address them individually. Nevertheless, certain principles should be adhered to throughout the parties' ICA. ; correspondingly, language authorizing such unbundling (e.g., XO proposed Section 3.1.4.1) is permissible. Language relieving SBC of its obligation to unbundle elements under Section 271 is

> prohibited . . . The Section 271 obligations confirmed in the TRO are not addressed and, indeed, did not need to be, since (unlike Section 251 obligations) they were not vacated by USTA II.
> Order, 04-0371 48 (emphasis added)

The Commission concluded that SBC must abide by its non-Section 252 obligations such as those required by Section 271 of the federal Act and Section 801 of the Public Utilities Act, and that it can only modify its obligations through properly negotiated interconnection agreements:

> [A]though SBC may believe that we have required unbundling under Section 13-801 (including TELRIC-priced unbundling) that exceeds what Section 251 would allow, that belief is irrelevant at present. Similarly irrelevant is the argument that our rulings are inconsistent with Section 261(c) of the Federal Act, which would contravene Section 13-801. Our currently viable unbundling rulings were based on our judgment that they are consistent with Section 261(c). Such judgment would have to be overturned on appeal or preempted through Section 253(d), not collaterally challenged in arbitration (**or worse, unilaterally by SBC, within the context of the ICA**). Put simply, our unbundling mandates are effective today, and unless or until they are altered (whether by us or by superior authority) they must be incorporated in the parties' ICA. **Future unbundling developments should be accommodated through change-of-law provisions.**
>
> Docket 04-0371 Order at 49-50 (emphasis added).

Finally, rejecting SBC's explicit change of law language, the Commission stated:

> The Commission concurs with XO and Staff that SBC's proposals would essentially replace the change-of-law provisions in the parties' existing ICA with unilateral powers for SBC. XO Init. Br. at 29; Staff Init. Br. at 62. Those provisions contemplate bilateral negotiations between the signatories. In contrast, SBC's amendatory contract language (e.g., SBC proposed Section 1.1) would empower SBC to decline to provide UNEs, based upon, first, its unilateral assessment of the ramifications of regulatory and judicial authorities, and, second, its unilateral judgment of the efficacy of those authorities themselves, based on criteria we rejected above. Such provisions do not belong in the parties' ICA, whether to incorporate changes already compelled by the TRO or any future changes associated with the TRO and USTA II.
>
> Docket 04-0371 Order at 50.

By proclaiming that certain aspects of the *TRRO* are self-effectuating, and that SBC is entitled to unilaterally implement its disputed interpretation of those rule changes, SBC is doing exactly what this Commission said it cannot do in Docket 04-0371 – it is ignoring the parties' change of law provisions and instead is unilaterally deciding for itself which elements it needs to offer. Thus, SBC's unilateral action is more than merely a breach of the duty to negotiate in "good faith" imposed on ILECs by Section 251(c)(1), it is a direct violation of this Commission's order in Docket 04-0371.

E. SBC Must Continue to Offer UNEs to Existing Customers.

In the *TRRO*, the FCC made it clear that it intended that existing **customers** continue to receive UNEs that will be denied new customers. SBC has decided that what the FCC really meant was existing **lines** could continue to be served with those UNEs but that SBC could deny existing customers the ability to obtain new or modified lines. Thus, SBC's Accessible Letter CLECALL 05-019, provides: "Therefore, as of March 11, 2005, in accordance with the *TRO Remand Order*, CLECs may not place, and SBC will no longer provision New, Migration or Move Local Service Requests (LSRs) for affected elements."

The Commission should reject SBC's overreaching, as SBC's claim is directly contrary to the wishes of the FCC. As discussed in the next section of this Brief, virtually every state commission that has ruled on this issue has found that the FCC intended to allow CLECs to serve their existing customers with the unbundled elements that are no longer impaired.

F. The Relief Requested By XO and Allegiance Has Been Awarded In Other States.

Several states have already told SBC that it must follow the process established by the FCC for identification of loops and transport not subject to unbundling. These cases include *In the matter, on the Commission's own motion, to commence a collaborative proceeding to*

monitor and facilitate implementation of Accessible Letters issued, Michigan PUC Case No. U-14447; *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, PUC of Texas Docket No. 28821; and *Complaint of Indiana Bell Telephone Company d/b/a SBC Indiana for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission Approved Interconnection Agreements*, IURC Docket No. 42749 directing SBC to follow the procedures set forth in paragraph 234 of the *TRRO.*

Finally, XO and Allegiance note that they are aware of **no** state that has accepted the position espoused by SBC that it may reject CLEC requests for changes, moves or additions for embedded customers. Every state addressing the issue has found that when the FCC's stated that it wanted to transition the embedded base of customers over one year, it meant embedded **customers**, not embedded **lines**. This principle applies to loops and transport as well as to the UNE-P and switching addressed in those cases.

G. SBC's Actions Are Per Se Violations of Section 13-514.

Section 13-514 of the PUA states that a telecommunications carrier "shall not knowingly impede the development of competition in any telecommunications service market." SBC's actions have violated that mandate. As noted by the Commission in its order granting emergency relief in order to prevent irreparable harm:

> What we can say with certainty at this juncture is that allowing SBC to discontinue offering certain UNEs after March 11, 2005 will interrupt the commercial relationships between XO and Allegiance and their customers. In particular, the loss of the ability to offer their end-customers certain products based on SBC's withdrawal of UNEs might never be corrected and could damage XO and Allegiance's competitive position. These circumstances constitute irreparable harm.
>
> Next, XO and Allegiance have demonstrated that immediate relief is in the public interest. The end-user customers of XO and Allegiance will be greatly inconvenienced by such a sudden, drastic change in the availability of certain UNEs from their chosen carrier. In addition, all telecommunications customers

> could be adversely affected by damage to the fair and effective competition promoted by the Illinois Act.
>
> Amendatory Order by the Commission at 9.

The testimony of Ms. Leeger supports the finding of the Commission. She testified:

> If SBC carries out its plans, XO and Allegiance would be forced to turn away new customers and unable to provide services to existing customers, resulting in irreparable and unquantifiable damages to XO's and Allegiance's goodwill and reputation. Additionally, XO's and Allegiances' existing customers would be denied their preferred carrier.

In summary, Ms. Leeger testified that SBC's actions unreasonably delay or impede the availability of telecommunications services to Illinois customers - Section 13-514(4). Ms. Leeger testified that XO and Allegiance would need to take additional costly and time consuming steps to replace the loops and transport SBC denies pursuant to its Accessible Letters.

Ms. Leeger then addressed each of the elements of Section 13-514 that XO and Allegiance believe SBC has violated.[34]

1. SBC's actions unreasonably refuse or delay interconnections or collocation or provide inferior connections to XO and Allegiance - Section 13-514(1).

Ms. Leeger testified that XO and Allegiance routinely use loops and transport UNEs to interconnect with SBC's network and SBC's action would be a refusal and delay of such interconnections.

2. SBC's actions unreasonably impair the speed, quality or efficiency of services used by XO and Allegiance - Section 13-514(2).

Ms. Leeger noted that both companies use high capacity loops and transport to serve their customers and they would be adversely impacted if they were unable to use those facilities.

3. SBC's actions are an unreasonable refusal and delaying of access by XO and Allegiance- Section 13-514(5).

[34] The Complaint alleged violations of Subsections 1, 2, 4, 6, 8, 11 and 12. XO and Allegiance are not pursuing the argument that SBC violated subsection 4.

Ms. Leeger stated that it appears that if SBC implements its unilateral Accessible Letters, XO and Allegiance will be refused access to high capacity loops and transport. She added that the steps required for compliance with Accessible Letter LECALL05-039 would result in unreasonably delay the provision of service to the customers of XO and Allegiance.

4. SBC's actions have a substantial adverse effect on the ability of XO and Allegiance to provide service to their Illinois customers - Section 13-514(6).

Ms. Leeger testified that SBC's attempt to unilaterally modify the terms and conditions of XO's and Allegiance's use of high capacity loops and transport, and the denial of some routes will adversely impact their ability to provide service to their customers.

5. SBC's actions violate the terms or delay the implementation of XO's and Allegiances' interconnection agreements in a manner that unreasonably delays, increases the costs or impedes the availability of telecommunications services to consumers - Section 13-514(8).

As noted above, SBC's intended actions are contrary to the parties' interconnection agreements, including the change of law and dispute resolution provisions. Ms. Leeger testified that SBC's stated actions would increase the costs and impede the availability of telecommunications services, namely loops and transport.

6 SBC's actions violate Section 13-801 of the Illinois Public Utilities Act - Section 13-514(11).

As noted above, SBC Accessible Letters do not even mention SBC's state law obligations pursuant to 220 ILCS 5/13-801 of the Public Utilities Act. SBC has an independent state law obligation to provide loops and transport and its intended actions would impede XO's and Allegiance's rights under Illinois law.

7. SBC's actions violate an order of the Commission regarding matters between telecommunications carriers - Section 13-514(12).

Section 13-801 of the Illinois Act was implemented in Illinois Commerce Commission Docket 01-0614. SBC's obligations to provide loops and transport were derived from that proceeding. SBC has violated the order in Docket 01-0614 by refusing to consider its Section 13-801 obligations in its Accessible Letters and the proposed interconnection agreement amendment it initially insisted XO execute.

H. The Commission Should Assess The Full Amount of XO's and Allegiance's Attorneys Fees Against SBC.

Section 13-516(a)(3) of the PUA provides that "the Commission shall award damages, attorney's fees and costs to any telecommunications carrier that was subjected to a violation of Section 13-514." 220 ILCS 5/13-516(a)(3). This directive reflects the intent of the General Assembly to encourage enforcement of the provisions of Section 13-514 of the Act. In a recent decision addressing attorneys' fees under Section 13-516 of the Act, the Illinois Appellate Court stated "it is well established that fee-shifting statutes are to be strictly construed and that the amount of fees to be awarded lies within the Commission's 'broad discretionary powers'" *Globalcom, Inc. v. Illinois Commerce Commission* 347 Ill.App.3d 592, 618 (1st Dist. 2004). In this proceeding, XO and Allegiance are entitled to the full amount of their attorneys' fees.

The Commission should "ascertain and give effect to the intention of the legislature." *Mike Yang v. City of Chicago* 195 Ill.2d 96, 103 (2001). In doing so, the Commission should "use the statute's plain language as the best indicator of the legislature's intent" and it should refuse to "depart from the statute's plain language by reading into it exceptions, limitations or conditions that conflict with the express legislative intent." *Id.* Additionally, the Commission should not resort to other aids of construction "where a statute's language is clear and unambiguous" as is the provision in Section 13-515 (220 ILCS 5/13-516(a)(3)) that the

Commission "shall award" attorney's fees to a carrier that is the victim of a violation of Section 13-514.

XO and Allegiance have already been successful in obtaining a Commission order prohibiting SBC from withholding high capacity loops and transport effective March 11, 2005.[35] XO and Allegiance believe that SBC's actions warrant the permanent relief requested by XO and Allegiance in their complaint and granted temporarily by the Commission in its order on XO's and Allegiance's Emergency Motion. Even if the Commission were to limit the relief in its final order, it should not affect the award of attorneys' fees. The General Assembly stated in clear and unambiguous words that the Commission "shall" award attorney's fees if a carrier "was subjected to a violation of 13-514." Interpreting similar language, the court in *Berlak v. Villa Scalabrini Home for Aged, Inc.*, stated: "The requirement that the licensee pay the prevailing resident's attorney's fees is mandatory as evidenced by the legislature's use of the word "shall" in the statute." 284 Ill. App. 3d 231, 219 Ill. Dec. 601, 671 N.E.2d 768 (1 Dist. 1996), appeal denied, 171 Ill. 2d 562, 222 Ill. Dec. 429, 677 N.E.2d 963 (1997).

General Illinois law on attorney fees supports an award of XO's and Allegiance's entire costs and attorney's fees. Where a plaintiff's claims of relief involve a common core of facts or are based on related legal theories, such that much of the plaintiff's attorney's time is devoted generally to the litigation as a whole, a fee award should not be reduced simply because all requested relief was not obtained. *Becovic v. City of Chicago*, 296 Ill.App.3d 236, 242 (1998); *Riverside v. Rivera*, 477 U.S. 561, 575-76 (1986).

The "common core of facts" principle used by Illinois courts is similar to the standard used by federal courts in Section 1983 civil rights actions. In *Hensley v. Eckerhart*, the U.S.

Supreme Court found that when claims are interrelated, as is often the case in civil rights litigation, parties may recover attorney's fees for time spent pursuing an unsuccessful claim if that time also contributed to the success of other claims. The Supreme Court stated that in such cases:

> [M]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Hensley v. Eckerhart, 461 U.S. 424, 435, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

In *Jafee v. Redmond* the 7th Circuit noted that it has used the "common core of facts" approach in Section 1983 cases, stating:

> In the context of partial recovery cases, we have interpreted *Hensley* to permit attorney's fees for unsuccessful claims when those claims involved a common core of facts or related legal theories. *See, e.g., Spanish Action Comm. v. City of Chicago*, 811 F.2d 1129, 1133 (7th Cir. 1987) . . .
>
> *Hensley's* rejection of "the mechanical claim-chopping approach", *see Lenard v. Argento*, 808 F.2d 1242, 1245 (7th Cir. 1987), has led us to an approach that is more in tune with the realities of litigation, in which we focus on the overall success of the plaintiff rather than the success or failure of each of the plaintiff's causes of action.

Jafee v. Redmond, 142 F3d 409, 414 (7th Cir. 1998).

Here, XO and Allegiance believe there is a clear basis for a finding that SBC Illinois knowingly and unreasonably impeded the development of competition, that SBC violated one or more of the subsections of Section 13-514 of the Illinois Act and that SBC may not unilaterally implement the *TRRO* through accessible letters, but must instead negotiate amendments to its interconnection agreements. Any minor variations from that expected relief should not affect the

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[35] XO and Allegiance only requested emergency relief related to high capacity loops and transport. Thus, the provision in the Commission's Amendatory Order allowing SBC to refuse to offer switching and UNE-P to new customers only affected the relief requested by the parties in Docket 04-0154, not XO and Allegiance.

amount of attorneys' fees. All of the arguments being made in this proceeding share the same common core of facts. Virtually all of the tasks in this proceeding, including initial investigation, drafting the complaint, assistance in preparing testimony, participating in hearings, and the drafting of briefs and motions would have been required to obtain virtually any portion of the relief requested by XO and Allegiance.

Additionally, the resolution of this complaint will affect more CLECs than just XO and Allegiance. The industry wide impact of the Commission's final order will be analogous to the society wide impact of a judicial decision in a federal civil rights action. Courts have recognized that successful civil rights litigants benefit society, often in ways that far exceed the ordered monetary damages. Given those benefits to the public, courts are willing to award attorneys' fees for successful civil rights litigants that are in excess of monetary awards to plaintiffs. As stated by the U.S. Supreme Court:

> As an initial matter, we reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See *Carey v. Piphus*, 435 U.S. 247, 266 (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. ..." *Hensley*, 461 U.S., at 444, n. 4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.
>
> *Riverside v Rivera*, 477 U.S. 561, 574, 106 S. Ct. 2686; 91 L. Ed. 2d 466 (1986).

A Commission final order based on the core claim in the XO and Allegiance complaint will benefit all CLECs and their customers. Therefore, XO and Allegiance should be awarded the full amount of their attorney's fees.

I. The Commission Should Assess the Full Amount of its Costs Against SBC.

Section 13-515 (g) of the PUA expressly directs the Commission to "assess the parties" for "all of the Commission's costs of investigation and conduct of the proceedings." *220 ILCS 5/13-515(g)*. That Section directs the Commission to "divide the costs according to the resolution of the complaint." *220 ILCS 5/13-515(g)*. The Commission should direct SBC to pay all of the Commission's costs in this proceeding. As noted above, XO and Allegiance have already been entirely successful in their motion for emergency relief. SBC's actions warrant a finding in favor of XO and Allegiance in the final order in this proceeding. SBC should therefore be directed to pay the Commission's entire costs.

IV. CONCLUSION

For the reasons stated above, the Commission should take the following actions:

(1) enter an Order finding that SBC Illinois knowingly engaged in prohibited conduct set forth in Section 13-514 of the PUA that has an adverse impact on competition;

(2) make permanent the requirement in the Amendatory Order that SBC continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252;

(3) direct SBC Illinois to pay the full costs of the Commission in this proceeding and the full attorneys' fees of XO and Allegiance in this proceeding; and

(4) grant such further or other relief as may be appropriate.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the INITIAL BRIEF OF XO ILLINOIS, INC. AND ALLEGIANCE TELECOM, INC. has been served upon the parties listed on the attached service list on April 18, 2005, by electronic mail.

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